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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI, ET AL.,
Appellants,

vs.

ISBRANDTSEN CO., INC., THE UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

JOHN J. O'CONNOR,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 47-749

ISBRANDTSEN CO., INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL.,

Defendants

MOTION TO AFFIRM

On February 10, 1949, the District Court granted defendant steamship conferences and lines members thereof permission to appeal to the Supreme Court of the United States from an order of said Court dated January 13, 1949. This motion to affirm on the ground that the questions presented by such appeal are so unsubstantial as not to need further argument is made pursuant to Paragraph 3 of Rule 12 and Paragraph 4 of Rule 7 of the Rules of the Supreme Court of the United States.

Preliminary Statement

On January 2, 1948 and August 24, 1948 the United States Maritime Commission, without notice or hearing, issued its orders approving United States Maritime Commission Agreements Nos. 4490-6 and 7920-1 authorizing shipping

conferences in the North Atlantic trade to employ the contract/non-contract exclusive patronage rate system. Pursuant to the approved Conference agreements, the defendant steamship lines, through their Conferences, announced that effective November 1, 1948 they were about to require all shippers to contract to employ Conference lines exclusively on pain of being charged 20% higher tariffs if they failed so to contract. Once having contracted, any shipper who breached by shipping goods via an independent non-Conference line would be required to pay to the Conference a penalty equal to twice the amount of freight that would have been payable under the contract in respect of the shipment constituting the violation, and would thereafter be denied the lower contract rates.

Immediately upon receiving notice from shippers that they were being solicited to sign exclusive patronage contracts and that after November 1, 1948 they would be unable longer to patronize Isbrandtsen Co., Inc., as an independent American Flag carrier, Isbrandtsen Co., Inc., instituted this action in the United States District Court pursuant to the provisions of the Shipping Act of 1916, as amended, 46 U. S. C. 830, the Urgent Deficiencies Act of 1913, as amended, 28 U. S. C. Sec. 2284, 2321-2325, and the Administrative Procedure Act of 1946, 5 U. S. C. 1009, to enjoin, set aside, annul and suspend orders and approvals of the United States Maritime Commission dated January 2, 1948 approving Conference Agreement designated by the Commission as Conference Agreement No. 4490-6, and August 24, 1948 approving Conference Agreement designated by the Commission as Conference Agreement No. 7920-1 on the ground that such Commission orders and approvals purport to authorize the defendant steamship lines concertedly to coerce shippers in the North Atlantic trade to patronize defendant steamship lines exclusively and to retaliate against shippers in such trade who patronize plaintiff.

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The Commission orders of January 21, 1948 and August 24, 1948 were issued pursuant to Section 15 of the Shipping Act of 1916 (46 U. S. C. 814), under which the Commission is authorized to approve and immunize, to a limited extent, under the Anti-trust Laws conferences of shipping lines. Section 15 provides that "The Commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds * * * to be in violation of this chapter, and shall approve all other agreements modifications, or cancellations."

However, Section 14 of the Shipping Act provides that "No common carrier by water shall directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country * * * Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

In the District Court, Isbrandtsen Co., Inc., contended that the Commission's purported authorizations to the defendant Conferences to employ the exclusive patronage contract system in the North Atlantic-European Continent East and Westbound trade were absolutely null and void as exceeding the authority conferred on the Commission by statute. Plaintiff contended that this conclusion necessarily followed from (a) the fact that the contract/non-contract system explicitly, on its face, retaliates and discriminates against a shipper who patronizes a non-conference carrier, and (b) the fact that the Shipping Act of 1916 explicitly, on its face, forbids any carrier to "retaliate against any shipper * * * or resort to other discriminating or unfair

methods, because *such shipper has patronized any other carrier* or *for any other reason*" (46 U. S. C. 812; emphasis supplied).

The District Court concluded that it should not finally pass on the validity of the challenged agreements until the Commission had had an opportunity to pass upon the validity of the agreements in an adversary proceeding (Conclusion of Law 1). However, the Court also found that "were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such proceeding, the plaintiff would be gravely prejudiced" (Conclusion of Law 2). Therefore, in view of the fact that the Commission lacked power to prevent the carriers from inflicting irreparable injury upon the plaintiff pursuant to the approved agreements, the District Court, in order to preserve the status quo pending further Commission proceedings, temporarily suspended the Conference Agreements and temporarily enjoined defendant carriers from effectuating their threat to institute the exclusive patronage system (Conclusion of Law 3).

Questions On Appeal

While the defendant carriers have made five assignments of error, upon analysis it will be found that the appeal presents only three questions:

1) Did the District Court lack jurisdiction temporarily to restrain defendants from engaging in certain acts and practices until further administrative proceedings could be had before the Commission in an adversary proceeding.

2) Did the District Court properly make an appropriate finding that the plaintiff would be irreparably injured pending reference to further administrative proceedings, and

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3) Did the District Court abuse its discretion in issuing a temporary injunction to maintain the status quo and to protect the plaintiff from irreparable injury pending further Commission proceedings.

No Substantial Question Presented

1. Even a cursory reading of the District Court's opinion and order reflects that the Court entertained no doubt of its jurisdiction to review the Commission's orders but elected to stay its hand until the Commission should hold the adversary hearings which the Commission had failed to provide prior to its approvals.

Not only did this action constitute an appropriate forbearance to exercise acknowledged judicial power in deference to the integrity of the administrative process, but it represented precisely the type of judicial restraint that the Supreme Court has enjoined upon lower courts in similar circumstances involving administrative proceedings. *General American Tank Car. Corp.* v. *El Dorado T. Co.*, 308 U. S. 422, 60 S. Ct. 325 (1939); *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 66 S. Ct. 843 (1946). As the Supreme Court observed in the first El Dorado case:

> When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but as in Mitchell Coal & Coke Co. *v.* Pennsylvania R. R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

2. In the course of its opinion the District Court found:

> Plaintiff and its predecessors have been engaged in the North Atlantic carriage since 1931, and the institution of the proposed exclusive patronage dual tariff system would greatly injure its business as an independent carrier.

That the exclusive patronage contract rate system would irreparably damage plaintiff's business as an independent American Flag carrier is obvious from the face of the contract agreement. Indeed, the Conference agreement and exclusive patronage contracts tendered shippers pursuant thereto leave no doubt that the system was explicitly designed to coerce shippers to cease dealing with plaintiff and must necessarily result in irreparable injury to the plaintiff.

However, in addition to the showing made on the face of the contracts themselves, plaintiff tendered the Court, in the form of affidavits, the expert views of plaintiff's Vice-President in charge of traffic, who described in detail the harmful effects the threatened institution of the exclusive patronage contract rate system was even then working on plaintiff's custom. The affidavits tendered were supported by photostatic copies of letters from shippers testifying to their satisfaction with the service of the plaintiff in the past and expressing their regret at the necessity of ceasing to patronize plaintiff after November 1. Defendant's only response to this showing was that plaintiff could avoid injury by joining the Conference!

Under the circumstances, the Court was compelled to conclude:

> Were the defendant carriers to institute their exclusive patronage system pending the Commission's decision upon such a proceeding, the plaintiff would be gravely prejudiced.

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On the face of the record here, the defendant is clearly unable to discharge the burden on appeal of showing that the Findings and Conclusions of the District Court were "clearly erroneous" (Rule 52, Rules of Civil Procedure).

3. A proceeding to review a Commission order is a "plenary suit in equity" (*Columbia Broadcasting Co.* v. *U. S.*, 316 U. S. 407). In the circumstances here, the District Court was clearly impelled to issue a temporary injunction to preserve the status quo pending the further administrative proceedings required by the court's order. Indeed, in a case such as this, had the District Court failed to issue an injunction, the Supreme Court might well have ordered such an injunction to protect the plaintiff from irreparable injury. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 49 S. Ct. 256.

In any case, it is familiar law that the application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order either granting or denying such an application will not be disturbed by an Appellate Court unless the injunction was improvidently issued. *Alabama* v. *United States*, 279 U. S. 229, 49 S. Ct. 266. Certainly, the issuance of the temporary injunction here could hardly be considered an abuse of the admitted discretion residing in the District Court to preserve the equities before it.

Conclusion

Under the circumstances, it can scarcely be contended that the defendants-appellants can discharge the burdens with which the rules of the Supreme Court and applicable principles of law charge them on this appeal. Therefore, plaintiff submits that no substantial purpose could be served by further argument in this cause, and respectfully moves

the Supreme Court to affirm the judgment of the District Court herein.

Respectfully submitted,

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